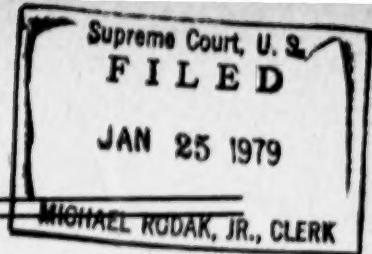


APPENDIX



In the Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-561

UNITED STATES OF AMERICA,

Petitioner

—v.—

NEIL T. NAFTALIN

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

**PETITION FOR A WRIT OF CERTIORARI FILED OCTOBER 2, 1978
CERTIORARI GRANTED DECEMBER 11, 1978**

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-561

UNITED STATES OF AMERICA,

Petitioner

—v.—

NEIL T. NAFTALIN

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

I N D E X

	Page
Docket Entries	1
Indictment	14
January 28, 1975 Memorandum Order of the District Court....	22
December 11, 1978 Order granting Certiorari	36

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

4-11-74 1) Filed Indictment

Ent'd. Order (Devitt, J.) for Issuance of Warrant of Arrest, Bond set at \$5,000 (10%)

Issued W/A and delvd. to U.S. Marshal.

4-12-74 2) Filed Warrant of Arrest with marshal's ret. of serv. 4-12-74

3) Filed \$5,000 Bond (10% Deposit or \$500.00)

4-29-74 4) Ent'd. arraignment Summary and Proceedings before Magistrate Cudd.

5) Ent'd. arraignment (Magistrate Cudd) on Ct. 1 thru 8, and plea of Not Guilty entered. Bond Cont in present amount, will sign order authorizing travel in 48 states. Counsel shall have 21 days in which to file motions.

5-3-74 6) Filed Order (Cudd, Magistrate) bond of deft. shall not restrict him from traveling anywhere in the United States (continental).

Mailed copy of aforesaid Order to counsel.

5-17-73 7) Filed Defts. Notice of Motion and Motion returnable May 29, 1974 at 9:30 A.M. for Discovery and Inspection with aff. of serv. by mail 5-17-74.

6-4-74 8) Filed Order (Cudd, J.) Deft. shall have thirty days from date of this Order to file his motion to dismiss the Indictment and to file any motions to suppress evidence.

Mailed copies to counsel.

6-11-74 9) Filed Stipulation and Order (Larson, J.) between attorneys for pltf. and defendant, that time which Deft. has to serve and file written exceptions with this Court to Order of the U.S. Magistrate, the Honorable J. Earl Cudd, in the above captioned matter dated June 4, 1974, may be, and it is hereby extended to and including June 14, 1974.

Mailed Stipulation and Order copies to counsel.

6-14-74 10) Filed Written Exception to Magistrate's Order of June 4, 1974, on Motion for Discovery and Inspection of Deft.

7-23-74 11) Filed Order (Larson, J. 7-19-74) that the time within which the deft. may file a motion to dismiss the indictment and/or to suppress evidence may be and the same hereby is, extended to a time 10 days after this Court rules upon the deft's written exceptions to Magistrate's order on Discovery, or such other time as the Court may determine in its order on the written exceptions.

12) Mailed notice to counsel of record.

7-29-74 13) Filed Order (Larson, J.) that deft's exceptions to Magistrate's order be denied. Motions to dismiss Indictment if any will be filed within 10 days. If Oral argument is requested by either party, the hearing will be held by Wednesday, August 14, 1974 at 8:45 A.M.

Mailed copies to counsel and delivered copy to U.S. Marshal.

8-14-74 4) Filed motion of defendant to dismiss indictment and for other relief, with aff. of service personally on 8-14-74.

15) Filed affidavit of Neal T. Naftalin, with aff. of service personally on 8-14-74.

8-30-74 16) Entd. defts. mo. for dismissal (Larson, J-Stafford, R.) argued, submitted and taken under advisement.

9-9-74 17) Filed Affidavit of John I. Mayer, 7251 W. Randolph St. Forest Park, Illinois, 60130 in above entitled matter.

18) Filed Affidavit of Barry D. Goldman, 6033 North Sheridan Road, Chicago, Ill. 60660 in above entitled matter.

19) Filed Affidavit of Martin A. King, 8525 Springfield Avenue, Skokie, Illinois 60076 in above entitled matter.

20) Filed Affidavit of Dennis J. Waldeck, 1949 Whitingham Lane, Hoffman Estates, Illinois 60172 in the above entitled matter.

9-9-74 21) Filed Affidavit of William D. Goldsberry, 126 S. Harvard, Arlington Heights, Illinois 60005 in the above entitled matter.

22) Filed Affidavit of Judith Joyce Shanahan, 300 Richmond Road, Kenilworth, Illinois, in the above entitled matter.

23) Filed Affidavit of Thomas E. Lynch, 1833 Greenleaf Avenue, Chicago, Illinois, in the above entitled matter.

24) Filed Affidavit of Jeffrey I. Bernstein, 1150 N. Lake Shore Drive, Chicago, Illinois, in the above entitled matter.

25) Filed affidavit of Joseph L. Grant, 3411 Camelot Drive N.E., Marietta, Georgia, in the above entitled matter.

26) Filed Affidavit of John Turner, 2623 Ivy Dale Drive, S.W., Atlanta, Georgia, 30318 in the above entitled matter.

9-12-74 27) Filed Transcript of Proceedings (Motion) August 30, 1974 (Stafford, R.)

9-16-74 Filed reporters Notes (Motions) 8-30-74 (Stafford, R.) in R Box 74-9.

1-24-75 28) Filed Order (Larson-J.) that the govt. produce for in camera inspection within 30 days the documents requested in paragraph 14, subdivision (a), (b), and (c) of defts motion for discovery and inspection; that judgment is reserved on defts motion to dismiss the indictment because of delay in instituting prosecution; and that except the aforesaid reservation on defts motion to dismiss because of delay in instituting prosecution, the defts motion to dismiss the indictment in its entirety, to dismiss certain counts of the indictment and to strike certain allegations as surplusage are denied.

Mailed copy of aforesaid order to counsel.

1-28-75 29) Filed Memorandum (Larson, J.) explaining his Order dated 1-24-75 which stated "MEMORANDUM TO FOLLOW".

Mailed copy of aforesaid Memorandum to Counsel.

- 4-24-75 30) Entd. record of hearing (Larson, J-Stafford, R.) Defts. Motion to dismiss indictment because of delay in instituting prosecution. Hearing cont. to 4-25-74 9:15.
- 4-25-75 31) Entd. record of hearing cont. (Larson, J-Stafford, R.) Defts. motion to dismiss because of delay in instituting prosecution. Submitted and taken under advisement, subject to filing of brief.
- 5-5-75 Filed reporters notes in Box R6,1975, (Motion) as of April 24, and 25, 1974.
- 5-5-75 32) Filed Transcript of Proceedings (Motion to Dismiss Indictment because of delay instituting prosecution) as of 4-24-75 (Stafford, R.).
- 8-8-75 33) Filed Order (Larson, J.) that deft. Naftalin motion to dismiss the Indictment granted.
- 34) Mailed copies of Order to Counsel.
- 9-4-75 35) Filed Notice of Appeal of the United States of America from the Order of the United States District Court of Minnesota, 4th Division, dated August 8, 1975, dismissing the indictment in the above entitled matter.
- Delivered c/c of Notice of Appeal to U.S. Marshal.
- Delivered c/c of Notice of Appeal to Iris Stafford, 542 U.S. Courthouse, Minneapolis, Minnesota, official court reporter to Judge Earl R. Larson.
- Mailed c/c of Notice of Appeal to Joe Walter, 3848 IDS Center, Mpls. Minn. counsel for deft.
- Mailed c/c of Notice of Appeal, two certified copies of docket entries to date and transmittal form to Mr. Robert C. Tucker, Clerk, United States Court of Appeals for the 8th Circuit, U.S. Courthouse and Customs House, St. Louis, Missouri, 63101.
- 9-12-75 36) Filed Designation of Record and Statement of Issues of the United States Government, Appellant, in the above entitled matter.

- 9-24-75 37) Filed Letter from counsel for Defendant Naftalin concurring with Designation of the Government.
- Mailed original and two copies of Items Number 1, 6, 7, 8, 9, 11, 13, 14, 28, 29, 33, 36 and 37, as designated by the Appellant together with Item 27, Transcript of Proceedings (Motion to Dismiss Indictment) as of 8-30-74 and Item 32 (Motion to Dismiss Indictment because of delay in instituting prosecution) 4-24-75 designated by Appellant, with three certified copies of docket entries to date; Included also are Deft. Exhibits A thru O and under separate cover Government Exhibit No. 1 shipped in two separate cartons marked Carton 1 and Carton 2, to Mr. Robert C. Tucker, Clerk, United States Court of Appeals for the Eighth Circuit, U.S. Courthouse and Customs House, St. Louis, Missouri 63101.
- 4-28-76 38) COPY OF ORDER of U.S. Court of Appeals for the Eighth Circuit dated April 26, 1976, staying issuance of the mandate for a period of thirty days.
- 39) NOTICE TO COUNSEL.
- 10-20-76 40) OPINION FROM U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT reversing the District Court's order of dismissal and remanding with instructions to reinstate the indictment.
- 41) JUDGMENT FROM U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT reversing the District Court's order of dismissal and remanding with instructions to reinstate the indictment.
- 42) NOTICE TO COUNSEL.
- 10-28-76 43) MINUTES OF PROCEEDINGS (Larson J-Stafford, R.) bond. cont. Waiver of Jury trial signed.
- 44) STIPULATION AND ORDER WAIVING Jury Trial (Larson, J.)
- 12-9-76 ELECTRONIC RECORDING Box 35 Env. 320 10-28-76 (Waiver of Jury Trial) (Stafford, R.)

- 12-9-76 45) MOTION of deft. to dismiss and for finding not Guilty.
- 12-14-76 46) MINUTES OF Court Trial: (Larson, J-Stafford, R.)
- 12-16-76 47) MINUTES OF Court Trial: (Larson, J-Stafford, R.)
- 12-17-76 48) MINUTES OF Court Trial: (Larson, J-Stafford, R.)
- 12-20-76 49) MINUTES—OF COURT TRIAL: Larson, J-Stafford, R.) Court Trial. Mr. Walters atty. for deft. renews the motion for Jdg't. of Acquittal and moves the Court to find the facts specially under Rule 23(c) and for arrest of Judgment under Rule 34. Ruling is reserved. Trial recessed to 12-21-76 9:30 A.M.
- 12-21-76 50) MINUTES OF COURT TRIAL: (Larson, J-Stafford, R.) deft. motion to consolidate the 8 counts in the Indictment into 1 count is denied. Mr. Anderson and Mr. Walters make closing arguments to the Court. Decision is reserved including ruling on deft. motion for judgment of acquittal and for dismissal account double jeopardy.
- 2-1-77 51) MINUTES OF PROCEEDINGS: (Larson, J-Stafford, R.) Determination of Guilt or innocence. Copy of Findings of Fact, conclusions of law and Verdict is handed to respective counsel. Defendant's motion for acquittal, made at the trial is denied. Deft. is referred to the Probation Office for pre-sentence investigation.
- 52) FINDINGS OF FACT. Conclusions of Law and Verdict of the Court finding the defendant guilty of each count in the Indictment.
- 53) NOTICE TO COUNSEL.
- 2-8-77 54) NOTICE AND MOTION to arrest Judgment, for a new trial, finding that defendant is Not Guilty and dismissal of Indictment returnable before Judge Earl R. Larson, Judge of the United States District Court for the District of Minnesota at a time to be set by the Court.

- 2-24-77 ELECTRONIC RECORDING NOTES in Box 36 Env. 338 Determination of guilt or innocence 2-1-77 Stafford, R.)
- 3-11-77 55) AFFIDAVIT of Neil T. Naftalin in support of defendant's motion to arrest Judgment, for a new trial, for a finding that defendant is not guilty and dismissal of the indictment.
- 3-18-77 56) MINUTES OF PROCEEDINGS: (Larson, J-Stafford, R.) deft. motion to arrest judgment; for a new trial; for finding of not guilty and dismissal of indictment. Motion is denied. Deft. motion for Judgment of Acquittal made at the close of court trial, is denied.
- SENTENCE IS IMPOSED: Imprisonment for five years on each of eight counts of Indictment, said sentences to run concurrently. Bond is ordered continued pending determination whether appeal will be filed.
- Issued Jdg't. and Commitment and dlvd. two c/c to U.S. Marshal.
- 3-23-77 57) C/C OF JUDGMENT AND COMMITMENT—Served 3-21-77.
- 3-25-77 58) NOTICE OF APPEAL. Receipt 64306
- Dlvd. c/c to U.S. Attorney
- Dlvd. c/c to U.S. Marshal
- Dlvd. c/c to Iris Stafford, Official Court Reporter to Judge Earl R. Larson, 446 U.S. Courthouse, Minneapolis, Minnesota 55401 (612) 335-0119
- Mailed c/c Notice of Appeal, two c/c of Docket entries to date together with transmittal form to Mr. Robert C. Tucker, Clerk, U.S. Court of Appeals for the 8th Circuit, U.S. Courthouse and Customs House, St. Louis, Missouri 63101.

3-29-77 ELECTRONIC RECORDING AND NOTES in Box 36 Env. 349 (3-18-77 Motions and Sentencing) Stafford, R.

59) AMENDED NOTICE OF APPEAL.

Dlvd. c/c to U.S. Attorney

Dlvd. c/c to U.S. Marshal

Dlvd. c/c to Iris Stafford, Official Court Reporter to Judge Earl R. Larson, 446 U.S. Courthouse, Minneapolis, Minnesota 55401 (612) 335-0119

Mailed c/c Amended Notice of Appeal, two c/c of Page 6 of the Docket entries to Mr. Robert C. Tucker, Clerk, U.S. Court of Appeals for the 8th Circuit, U.S. Courthouse and Customs House, St. Louis, Missouri 63101.

3-31-77 60) MOTION of deft. for an ORDER to clerk of Federal District Court to grant temporary custody of all trial exhibits to defendant's attorneys.

61) ORDER (Larson, J.) to Clerk of Federal District Court granting temporary custody of all trial exhibits to defendant's attorneys.

62) NOTICE TO COUNSEL.

4-4-77 63) APPELLANT'S DESIGNATION OF RECORD AND STATEMENT OF ISSUES.

4-14-77 64) ORDER of the United States Court of Appeals for the Eighth Circuit that appellant in this case is granted permission to proceed in forma pauperis to the extent that the United States will pay for preparation of the transcript of testimony. The official court reporter for the District of Minnesota is directed to prepare, at the expense of the United States, an original and one copy of the transcript. The original is to be delivered to counsel for appellant and the copy filed with the clerk of the district court for transmittal to the clerk of this court. The court enters this order after finding that preparation for transcript at the expense of the United States is required for disposition of the appeal.

65) NOTICE TO COUNSEL. Dlvd. copy of order to Iris Stafford, Official Court Reporter to Judge Earl R. Larson.

4-15-77 66) APPELLEE'S DESIGNATION OF RECORD. Mailed Designated Record on Appeal and two copies to Mr. Robert C. Tucker, Clerk, United States Court of Appeals for the Eighth Circuit, U.S. Courthouse, St. Louis, Missouri 63101. (All trial exhibits and transcripts will be sent upon completion of the transcripts).

4-27-77 67) ORDER from the United States Court of Appeals for the Eighth Circuit, that the appellant may proceed in forma pauperis and proceed under local rule 11; however, if the appellee, United States, desires a court reporter to transcribe opening and closing statements, the appellee should order and pay for them directly.

68) NOTICE TO COUNSEL. Dlvd. copy to Iris Stafford, official court reporter to Judge Larson.

5-2-77 69) TRANSCRIPT OF PROCEEDINGS (Motions and Sentencing) 3-18-77 (Stafford, R.)

70) TRANSCRIPT OF PROCEEDINGS (Index to Trial Proceedings 12-14 thru 12-21, 1976) Stafford, R.)

71) TRANSCRIPT OF PROCEEDINGS (Volume I Trial) Dec. 14, 1976 Pages 1 thru 197.

72) TRANSCRIPT OF PROCEEDINGS (Volume II Trial) Dec. 16, 1976, Pages 198 thru 352 and Dec. 17, 1976, Pages 353 thru 438.

73) TRANSCRIPT OF PROCEEDINGS (Volume III Trial) Dec. 20, 1976, Pages 439 thru 582 and December 21, 1976 Pages 583 thru 621.

74) CJA 21 for Transcripts, Iris Stafford, Court Reporter. Mailed copies 1 and 4 to Administrative Office, filed copy 5 in Clerk's file, Copy 3 to Court Reporter and copy 2 on left side of clerk's file.

Mailed Items 69 thru 73 together with Govt. and Deft. Exhibits this date to Mr. Robert C. Tucker, Clerk, U.S. Court of Appeals for the 8th Circuit, U.S. Courthouse and Customs House, St. Louis, Missouri 63101.

5-16-77 REPORTER's NOTES Re: Court trial on 12-14-16-17-20-21/76 in Box R-77-4 (Stafford, R)

8-5-77 75) c/c of Order of the United States Court of Appeals for the 8th Circuit remanding this case to the United States District Court for the District of Minnesota for the purpose of acting on appellant's motion for admission to bail pending appeal and, if the said petition is granted, for the purpose of setting the terms of release on bail pending appeal.

76) NOTICE TO COUNSEL.

8-12-77 77) ORDER (Larson, J.) That the motion for release on bail pending appeal and decision by the Court of Appeals is granted. (2) That the bond in its present form and amount be continued.

8-12-77 78) NOTICE TO COUNSEL. c/c to Robert Tucker, Clerk U.S. Court of Appeals for the 8th Circuit, c/c to deft. FCI, Sandstone, and to Classification and Parole, Sandstone, Minnesota and to U.S. Marshal.

8-17-78 79) MANDATE of the United States Court of Appeals for the 8th Circuit vacating the conviction on Ct. VI and the Judgment of conviction and also the Indictment shall be dismissed.

80) JUDGMENT of the United States Court of Appeals for the 8th Circuit on consideration whereof, it is now here ordered and adjudged by this court, that the Judgment and sentence of the United States District Court for the District of Minnesota, as to Counts I-V, VII and VIII be and is hereby reversed. And it is further ordered by this Court that this cause as to Count VI be and is hereby vacated and the Indictment shall be dismissed in accordance with the majority opinion of this Court.

81) NOTICE TO COUNSEL. c/c to Deft.

GENERAL DOCKET

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

DATE

1977

Mar. 30 Cert. copies Notice of Appeal, Docket Entries of D.Ct.

Mar. 30 Request for docketing fee.

Apr. 1 Amended notice of appeal rec'd from District Court

Apr 7 Appearance for appellant.

Apr 7 Mo aplnt for lv to proceed in forma pauperis for transcript at gov. expense.

Apr 7 Affidavit in support of motion.

Apr 12 Order: U.S. will pay for transcript of testimony; court reporter is directed to prepare original and one copy, etc.

Apr 18 RECEIVED ORIGINAL AND TWO COPIES DESIGNATED RECORD

Apr 18 Motion appellant to modify order of April 12

Apr 25 Order: Appellant may proceed in forma pauperis and under local rule 11; however, if the U.S. desires a court reporter to transcribe opening and closing statements; the appellee should order and pay for them directly

May 2 28 day ltr: Aplnt BR due 5/30/77 (TR fld in DtCt 5/2/77)

May 5 RECEIVED 1 VOLUME MOTIONS AND SENTENCING; 1 INDEX TO TRIAL PROCEEDINGS; 3 VOLUMES TRANSCRIPT; 2 BROWN ENVELOPES OF EXHIBITS.

May 31 Brf aplnt w/ser O+4

June 20 Request by counsel for appellant for o/a at earliest opportunity.

12

DATE

1977

June 24 Mo appellee for ext of time to file brief.

June 24 Order: Appellee may have thru July 1 to serve and file answer brief

Jul 5 Brf aplee O+5

Jul 5 Ser w/brf aplee

Jul 11 Rep brf applnt w/ser O+4

July 22 Mo applnt for bail.

Aug 2 Transferred to August session

Aug. 3 Order: Court remands this case to Dist. Ct. for purpose of acting on appellant's motion for admission to bail pending appeal, & if said petition is granted, for the purpose of setting the terms of release on bail pending appeal.

Aug 16 Certified copy order of District Court granting mo for release on bail pending appeal and continuing bond in its present form and amount.

Aug. 30 Appearance for appellee

Aug. 30 Arg. & sub. to Judges Bright, Ross, Henley. Joe A. Walters for appellant. Thorwald H. Anderson, Jr., AUSA for appellee. Concl. by Walters. Recorded.

1978

June 13 Opinion by Judge Henley. Concurring & dissenting opinion by Judge Ross (Published)

June 13 JUDGMENT: Judgment & sentence of Dist.Ct. as to Counts I-V, VII, and VIII is reversed; as to Count VI is vacated and dismissed in accordance with majority opinion.

June 26 Mo appellee for ext of time to file pet for reh.

June 26 Certificate of service.

July 3 ORDER: Appellee may have to and including 7/27/78 to serve and file petition for rehearing.

13

DATE

1978

July 27 Petition of appellee for rehearing en banc and rehearing T

July 27 Certificate of service of appellee's petition for rehearing.

Aug. 4 ORDER: Petition of appellee for rehearing en banc and rehearing is denied.

Aug 14 Mandate issued.

Aug 18 Receipt for mandate.

Sept 5 Letter from Clerk of Supreme Court stating extension of time to file petition for writ of certiorari has been granted to 10/3/78 by Mr. Justice Blackmun in Case No. A-214.

Oct. 24 Notice of filing of petition for writ of certiorari to Supreme Ct. in Case No. 78-561 (as of 10/2/78)

Dec 15 Order of Supreme Court GRANTING certiorari in Case #78-561.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA

v.

NEIL T. NAFTALIN

INDICTMENT

(15 U.S.C. § 77(q)(a))

The United States Grand Jury charges that:

COUNT I

1. From on or about July, 1969, and continuing thereafter to on or about October, 1969, in the District of Minnesota, and within the jurisdiction of this court and elsewhere,

NEIL T. NAFTALIN

defendant herein, wilfully and knowingly did employ a scheme and artifice to defraud broker/dealers and said defendant did employ manipulative and deceptive devices and contrivances and did engage in fraudulent transactions, practices, and a fraudulent course of business which scheme and artifice to defraud and fraudulent transactions, practices and course of business are set forth more fully below:

2. From on or about February 10, 1960, and continuing thereafter up to and including the present, Naftalin & Co., Inc., a corporation duly organized under and by virtue of the Laws of the State of Minnesota, maintains its principal offices in Minneapolis, Minnesota. Since February 25, 1960 and continuous thereafter up to May 17, 1973, Naftalin & Co., Inc., was registered with the Securities & Exchange Commission pursuant to Section 15(b) of the Securities Exchange Act, 15 U.S.C. Sec.

780(b). Naftalin & Co., Inc. was also a member of the National Association of Securities Dealers, Inc., a national securities association registered pursuant to Section 15A of the Securities Exchange Act, 15 U.S.C. Sec. 78o-3, since 1960. From the time of its registration in 1960 through approximately the end of 1962, Naftalin & Co., Inc. conducted a general securities business in the over-the-counter market from its offices in Minneapolis, Minnesota. Since 1963 through December, 1969, except for a few isolated transactions, Naftalin & Co. did not conduct a public business, but rather traded for its own account through various broker/dealers.

3. At all times mentioned in this indictment, Neil T. Naftalin, defendant herein, was President, principal executive officer, and majority shareholder of Naftalin & Co., Inc.

4. As part of said scheme and artifice to defraud and fraudulent course of business and for the purposes of deceiving and defrauding the broker/dealers and to carry out the scheme to defraud, defendant Neil T. Naftalin did directly and indirectly in the offer and sale of securities, to wit, the stocks of: American Research and Development, Avon Products, Inc., Burroughs Corporation, Control Data Corporation, Fairchild Camera and Instrument, knowingly and wilfully make false and misleading statements of material facts, which statements included, but were not limited to the following:

- A. That Naftalin & Co., Inc. owned the aforementioned securities.
- B. That Naftalin & Co., Inc. was long the securities being sold.
- C. That the sale of the aforementioned securities was not a short sale.
- D. That delivery of the aforementioned securities would be delayed because Naftalin & Co., Inc., had purchased them in the third market and the securities were carrying due bills.
- 5. It was further part of said scheme and artifice to defraud and fraudulent course of business and for the

purposes of deceiving and defrauding the broker/dealers and to carry out the scheme to defraud, defendant, Neil T. Naftalin, did directly and indirectly in the offer and sale of the aforementioned securities by Naftalin & Co., Inc. knowingly and wilfully omit to state and did conceal from the broker/dealers material facts which were necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, including, but not limited, to the following:

- A. That the sales were short sales.
- B. That Naftalin & Co., Inc. could not meet the margin requirements for the short sales.
- C. That Naftalin & Co., Inc. had made other short sales.
- D. That broker/dealers to or through whom Naftalin & Co., Inc. had made short sales were requesting Naftalin & Co., Inc. to make delivery.
- E. That Naftalin & Co., Inc. was financially unable to purchase or otherwise acquire stock necessary to cover the short sales.

6. As further part of said scheme and artifice to defraud and fraudulent course of business and for the purpose of deceiving and defrauding the broker/dealers and to carry out the scheme to defraud, defendant Neil T. Naftalin did directly and indirectly in the offer and sale of the aforementioned securities knowingly and wilfully subsequent to the settlement dates, make false and misleading statements of material facts, including, but not limited to the following:

- A. That the securities sold had been purchased in the third market and had not yet been received by said Naftalin & Co., Inc.
- B. That the securities sold had been split and delivery was slow.
- C. That the stock "was coming" or "was en route."
- D. That delivery of the securities had already been attempted.

- E. That the trades were being processed at the bank that handled Naftalin & Co., Inc.'s clearances.
- F. That there were long sales of the securities which Naftalin & Co., Inc. was receiving from other brokers.
- G. That Naftalin & Co., Inc. was in the process of obtaining proper certificate denominations for delivery and that the broker/dealer should not "buy in" Naftalin & Co., Inc.
- H. That the securities sold as aforesaid by Naftalin & Co., Inc. were due Naftalin & Co., Inc. from other brokers and had not yet been received.
- I. That some of the said securities would be delivered in a week or a week and a half.
- J. That Naftalin & Co., Inc. was having difficulty in obtaining delivery of some of said securities from its sellers.

7. On or about July 22, 1969, and continuing thereafter until on or about October 2, 1969, the said defendant, Neil T. Naftalin, did by the use of the mails in the offer and sale of securities to Paine, Webber, Jackson and Curtis, unlawfully, wilfully and knowingly, in the manner and means more fully described above, directly and indirectly employ said device, scheme and artifice to defraud, and did engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon Paine, Webber, Jackson and Curtis, such use of the mails being as follows:

The defendant, Neil T. Naftalin, on or about July 22, 1969, wilfully and knowingly, directly and indirectly caused Paine, Webber, Jackson & Curtis, to send and deliver by the United States mail an envelope addressed to Naftalin & Co., Inc., at Minneapolis, Minnesota, which envelope contained a confirmation for the sale of 500 shares of American Research and Development, all in violation of Title 15, Section 77(q)(a) of the United States Code.

COUNTS TWO THROUGH FIVE

The United States Grand Jury further charges that:

1. Paragraphs 1 through 6 of Count One are realleged herein.
2. On or about the respective dates set forth below in each of Counts Two through Five, in the District of Minnesota,

NEIL T. NAFTALIN

defendant herein, did, by use of the mails in the offer and sale of securities to each of the respective broker/dealers set forth hereinafter in Counts Two through Five in the manner and means more fully described above, willfully and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud, and did engage in transactions, practices, and a course of business which would and did operate as a fraud and deceit upon the respective broker/dealers set forth hereinafter, and said defendant wilfully and knowingly, directly and indirectly caused to be sent and delivered by the United States mail such matters as hereinafter specified:

<i>Count</i>	<i>Broker/Dealer</i>	<i>Date</i>	<i>Security Involved</i>	<i>Matter Sent & From Whom</i>
Two	Paine, Webber, Jackson & Curtis	8-5-69	1,000 shares of Burroughs Corporation	An envelope sent with confirmation of 1,000 shares sold, sent by Paine, Webber, Jackson & Curtis.
Three	Piper, Jaffray & Hopwood, Inc.	8-7-69	1,000 shares of Burroughs Corporation	An envelope sent with confirmation of 1,000 shares sold, sent by Piper, Jaffray & Hopwood, Inc.
Four	Dain, Kalman & Quail, Inc.	8-8-69	1,000 shares of Control Data Corporation	An envelope sent with confirmation of 1,000 shares sold, sent by Dain, Kalman & Quail.
Five	Merrill Lynch, Pierce, Fenner, & Smith, Inc.	8-20-69	500 shares of American Research Development	An envelope sent with confirmation of 500 shares sold, sent by Merrill Lynch, Pierce, Fenner, & Smith.

All in violation of Title 15, United States Code, Section 77(q)(a).

COUNTS SIX THROUGH EIGHT

The United States Grand Jury further charges that:

1. Paragraphs 1 through 6 of Count One are realleged herein.
2. On or about the respective dates set forth below in each of Counts Six through Eight, in the District of Minnesota,

NEIL T. NAFTALIN

defendant herein, did, by the use and means or instruments of communication in interstate commerce, more particularly the use of interstate telephone in the offer and sale of securities to each of the respective broker/dealers set forth hereinafter, in Counts Six through Eight, in the manner and means more fully described above, willfully and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud, and did engage in transactions, practices, and a course of business which would and operate as a fraud and deceit upon the respective broker/dealers set forth hereinafter, and said defendant willfully and knowingly, directly and indirectly used the interstate telephone as hereinafter specified:

Count	Date of Telephone Call	Person Initiating Call	Person Called	Security Involved
Six	On or about August 28, 1969	Neil T. Naftalin	H. S. Kipnis & Co. 209 S. LaSalle St. Chicago, Ill.	1,000 shares of Fairchild Camera & Instrument Corporation
Seven	On or about August 4, 1969	Neil T. Naftalin	H. S. Kipnis & Co. 209 S. LaSalle St. Chicago, Ill.	600 shares of American Research & Development
Eight	On or about August 1, 1969	Neil T. Naftalin	H. S. Kipnis & Co. 209 S. LaSalle St. Chicago, Ill.	1,000 shares of Avon Products, Inc.

All in violation of Title 15, United States Code, Section 77(q)(a).

A TRUE BILL

/s/ Robert G. Renner
United States Attorney

/s/ Richard L. Johnson
Foreman

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-74-Crim. 73

UNITED STATES OF AMERICA, PLAINTIFF

vs.

NEIL T. NAFTALIN, DEFENDANT

MEMORANDUM

The eight count Indictment charges defendant with violating § 17(a)(1) and (3) of the Securities Act of 1933, 15 U.S.C. § 77(q)(a)(1) and (3),¹ by defrauding

¹ Section 17(a), 15 U.S.C. § 77(q)(a) provides:

"(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

- (1) to employ any device, scheme, or artifice to defraud, or
- (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Willful violations of § 17(a) are made subject to criminal sanctions by § 24 of the Act, 15 U.S.C. § 77x. It reads:

"Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than \$5,000 or imprisoned not more than five years, or both."

certain broker/dealers in connection with sales of stock made by the broker/dealers for the account of Naftalin & Co., Inc. Defendant has moved to dismiss the entire Indictment because (1) it does not state facts sufficient to constitute an offense against the United States; (2) it improperly alleges a single scheme to defraud under § 17(a)(1) in a multiplicity of counts; and (3) the intentional delay of four and one-half years from the commission of the alleged offenses until the return of the Indictment violates defendant's right to due process of law. Defendant has moved in the alternative for (4) dismissal of Counts I through V for lack of jurisdiction because they fail to allege a sufficient nexus with interstate commerce or the mails; and (5) for dismissal of Counts II through VIII for failure to state an offense because of the absence of the allegation that defendant acted "unlawfully." Additionally, defendant has moved that certain allegations of the Indictment be stricken as surplusage pursuant to Rule 7(d), Fed. R. Cr. P.

I. FACTS SUFFICIENT TO CONSTITUTE AN OFFENSE—

The standards to be applied on a motion to dismiss an Indictment are set forth in *Russell v. United States*, 369 U.S. 749 (1961). *Russell* requires that an Indictment contain the essential elements of the offense intended to be charged, adequately apprise the defendant of what he must be prepared to meet, and be sufficiently specific to indicate to what extent a conviction or acquittal upon it would be a defense to a future prosecution on a similar charge. 369 U.S. at 764-765.

Defendant first contends that § 17(a) is directed only to issuers, underwriters, dealers, and individuals associated with the issuers, underwriters or dealers. Defendant notes that the Eighth Circuit held in review of the Naftalin & Co. bankruptcy proceeding that Naftalin & Co. was not a broker/dealer. *In re Naftalin & Co., Inc.*, 469 F.2d 1166 (8th Cir. 1972). Therefore, the argument concludes, defendant cannot be charged under § 17(a).

This argument must be rejected on two grounds. First, the Eighth Circuit's ruling that Naftalin & Co. was not a broker/dealer was for the purpose of determining at what point brokers should have bought-in in order to minimize their losses on stock which they had sold on account for Naftalin & Co., but which Naftalin & Co. never delivered. The Court's ruling does not imply that Naftalin & Co. is not to be considered a broker/dealer in other contexts. It does not negate the allegation in Count I, paragraph 2, of the Indictment that Naftalin & Co. was a registered broker/dealer.

Secondly, this Court interprets "any person" in § 17(a) according to its literal meaning. If Congress had wished to limit this section to issuers, underwriters, brokers, and their staffs, it would have expressly so provided. Instead, Congress drafted a broad remedy that would reach any kind of fraud in the offer or sale of securities. Defendant comes within the class defined by the words "any person."

Defendant next argues that the Indictment fails to state an offense because it does not allege that he defrauded "purchasers" of securities. Section 17(a)(3) is directed to any transaction which operates "as a fraud or deceit upon the purchaser." Defendant contends that it is implicit in each subdivision of § 17(a) that the fraud or misrepresentation affect a purchaser. Defendant's contention relies on *Greater Iowa Corp. v. McLendon*, 378 F.2d 783 (8th Cir. 1967), and can be summarized as follows:

Greater Iowa observed: ". . . § 5(a) and § 17(a) were designed primarily for the protection of investors who may purchase the unregistered or fraudulently sold shares. [Citation omitted.]" 378 F.2d at 790. It further stated: "It is our conclusion that private civil liability for violations of § 5(a) and § 17(a) exists only when the provisions of § 12 (15 U.S.C. § 77 1) are met." *Id.* Since § 12 provides that one who makes a misrepresentation in the sale of securities "shall be liable to the person purchasing such security from him," then § 17(a) applies only where a purchaser of securities has been defrauded.

This argument must be evaluated in light of the facts of *Greater Iowa*. The defendants in *Greater Iowa* had established a voting trust in an effort to gain control of the corporation. They issued certificates in the trust in exchange for shares of the corporation. The plaintiffs were the corporation, its directors, and certain shareholders. None of them had subscribed to the voting trust. The Court held that since they had not purchased trust certificates nor "had any semblance of legal privity" (378 F.2d at 790) with the defendants, they had no standing to bring a civil action under § 17(a).

The present case differs from *Greater Iowa* in that the brokers who are alleged to have been defrauded were in privity with defendant and come within the class to be protected by the statute. The Indictment charges that the brokers acted as agents of defendant in selling stocks for him and suffered losses as a direct result of his scheme. In contrast, the plaintiffs in *Greater Iowa* suffered no direct loss. At most, they were threatened with an indirect loss, i.e., loss of control of the Greater Iowa Corporation. *Greater Iowa* does not require dismissal here because protection of brokers from fraudulent short sales schemes comes within the scope of § 17(a).

Reading § 17(a) literally, only subdivision (3) requires that the defrauded party be a purchaser. The acts specified in each subdivision are separate and distinct; each is an "allowable unit of prosecution." *U.S. v. Amick*, 439 F.2d 351 (7th Cir. 1971), cert. den. 404 U.S. 823, *U.S. v. Birrell*, 266 F. Supp. 539 (S.D.N.Y. 1967). Therefore, as to § 17(a)(1), the Indictment is not to be dismissed for failure to allege involvement of a purchaser.

The Government argues that it can satisfy the purchaser requirement of subdivision (3) by proving that the shares sold through H. S. Kipnis & Co. were bought for Kipnis' own account and, alternatively, by proving that defendant's failure to deliver the securities sold forced the other brokers to purchase securities in the market to cover the fraudulent sales. The first of these contentions must be rejected because the Indictment does not allege that Kipnis was a purchaser. "[A] court can-

not permit a defendant to be tried on charges that are not made in the Indictment against him." *Stirone v. United States*, 361 U.S. 212, 217 (1960). The second contention must also be rejected in light of the principle that penal statutes are to be strictly construed. Subdivision (3) requires "a fraud or deceit upon the purchaser." The fraud charged was upon the brokers as selling agents. Regardless of the subsequent buy-in, a fraud upon a selling agent as to ownership of the securities sold cannot fairly be construed as a fraud "upon the purchaser." Therefore, the Government will be limited at trial to proof of violations of § 17(a)(1).

II. MULTIPLICITY OF COUNTS—

Defendant contends that the allowable unit of prosecution is the fraudulent course of conduct and that any particular use of the mails or telephone in connection with any particular sale is only a jurisdictional act and not a separate offense. Defendant seeks dismissal of the Indictment or, in the alternative, consolidation into a single count.

Federal Courts have expressed at least four different views as to the allowable unit of prosecution under § 17(a). These views, as summarized by the Seventh Circuit, are set out in a footnote.² This Court agrees with the Seventh Circuit's interpretation:

² *United States v. Amick*, 439 F.2d 351, 359 (7th Cir. 1971), cert. den. 404 U.S. 823, summarizes the different views:

"There is authority for the view (1) that, as is true of mail fraud, each separate use of the mails in the execution of a scheme to defraud in the sale of securities constitutes a separate offense;¹¹ (2) that each separate offer or sale transaction in which the proscribed conduct is employed and the mails used is the allowable unit;¹² (3) that where an indictment charges employment of proscribed conduct in separate transactions as separate counts, the determination whether there was one offense with several victims or a separate offense upon each victim can ordinarily not be made until proof is in;¹³ (4) that where an indictment alleges a scheme to defraud and a number of separate mailings and sales in separate counts, but fails to show that the crime charged in any one count differs from that

"[W]here an indictment charges employment of proscribed conduct in separate transactions as separate counts, the determination whether there was one offense with several victims or a separate offense upon each victim can ordinarily not be made until proof is in." *U.S. v. Amick*, 439 F.2d 351, 359 (7th Cir. 1971), cert. den. 404 U.S. 823.

The counts of this Indictment charge not only separate mailings but also separate sales. The Court cannot conclude as a matter of law that the Government will be unable to prove separate and distinct offenses. Therefore, defendant's motion must be denied at this time. It may be renewed at the close of trial.

III. DELAY PRIOR TO INDICTMENT—

The sales on which the Indictment is based are alleged to have taken place in August 1969. Defendant states that the Securities and Exchange Commission began an investigation of these sales in October 1969; that the SEC ascertained the essential facts of the present Indictment no later than November or December 1969; that before this Indictment was sought, the SEC participated in a

charged in the others, all counts are to be consolidated and all but one dismissed as separate counts.¹⁴

[FOOTNOTES]

¹¹ *Palmer v. United States* (10th Cir., 1956), 229 F.2d 861, 867, cert. den. 350 U.S. 996, 76 S.Ct. 546, 100 L.Ed. 861.

¹² *Sanders v. United States* (5th Cir., 1969), 415 F.2d 621, 626; *United States v. Saporta* (E.D.N.Y., 1967), 270 F. Supp. 183, 186. In this circuit it has been said that 'the government must show some impact of the scheme on the investor and that the mails were used in those instances where the impact occurred.' *United States v. Schaefer* (7th Cir., 1962), 299 F.2d 625, 629.

¹³ *United States v. Birrell* (S.D.N.Y., 1967), 266 F. Supp. 539, 544.

¹⁴ *United States v. Hughes* (S.D.N.Y., 1961), 195 F. Supp. 795, 798.

civil action,⁸ a bankruptcy appeal,⁹ and an administrative proceeding,¹⁰ all of which concerned the same facts alleged in the Indictment. Defendant argues that the SEC's involvement in these non-criminal proceedings over a four and one-half year period prior to the Indictment has violated defendant's Fifth Amendment guarantee of due process of law.

To support these claims, defendant sought in May 1974 (1) discovery of correspondence between brokers or the New York Stock Exchange and the SEC, the Federal Reserve Board, or the Justice Department concerning the subject matter of the present Indictment; and (2) discovery of internal documents of the SEC, Federal Reserve Board, and the Justice Department concerning investigation and institution of prosecution in the present case. The Magistrate denied these requests for discovery in his Order of June 4, 1974. That denial was based on *United States v. Emory*, 468 F.2d 1017 (8th Cir. 1972), in which the Court of Appeals ruled that a showing of substantial prejudice beyond a bare claim of faded memories was essential to establishing a violation of due process through pre-Indictment delay. This Court summarily affirmed the Magistrate's Order in its Order of July 29, 1974.

Subsequent to the July 29 Order, defendant submitted an affidavit stating that he would be prejudiced by the delay because of the death on April 1, 1972, of John M. Dryfoos, a senior partner in a New York brokerage firm. According to the affidavit, Dryfoos would have testified that Naftalin & Co. bought substantial amounts of securities from his firm in 1968 and 1969; that on many occasions immediate delivery of the securities was provided; and that Naftalin & Co. maintained its account in good standing. Defendant apparently contends that Dryfoos' testimony would be relevant to the issue of intent to defraud. Assuming for the purpose of the present motion that Dryfoos' testimony would have been relevant, the

Court finds that the dealings about which Dryfoos would have testified can be established from the records of the Naftalin and Dryfoos brokerage firms. (See Government's Brief at p. 3.) The Court again concludes that defendant has failed to demonstrate substantial prejudice under the *Emory* standard.

Since the present motions were taken under advisement in September, two decisions have been handed down which suggest reconsideration of the denial of the discovery requests. In *United States v. Jackson*, No. 74-1045 (8th Cir.) decided September 13, 1974, the Court of Appeals by Judge Heaney rejected a claim that a pre-Indictment delay had violated due process. The Court in *Jackson* relaxed the *Emory* requirement that an affirmative showing of substantial prejudice was essential for a finding of a violation of due process:

"It is often said that unreasonable delay must coincide with prejudice before the due process clause requires reversal and hence many courts after finding lack of prejudice, refuse to consider the reasons for delay

"Since we prefer to view the due process claim as one involving a balancing process, we hesitate to say that prejudice could never be presumed in an outrageous case of unjustified delay." *United States v. Jackson*, *supra*, slip op. at 3-4 n.2 (citations omitted).

In *United States v. U.S. Gypsum Co.*, 43 U.S.L.W. 2194 (W.D. Pa. Oct. 21, 1974), the Court ordered the Government to produce all internal memoranda from a 13 year period relevant to the claim that the Government had intentionally delayed prosecution on criminal antitrust charges in order to impair the defense. "[R]ecognizing that proof of this [intentional delay] could be found only in the Government's files, if, indeed, it existed at all," the Court ordered production of "all material which might have any bearing on the point [defendants] wish to prove." 43 U.S.L.W. at 2195. After in camera examination of "a mountain" of Antitrust Division and FTC internal memoranda, the Court concluded that the docu-

⁸ *SEC v. Naftalin & Co.*, No. 4-69-Civil 385 (D. Minn. 1969).

⁹ *In re Naftalin & Co.*, 469 F.2d 1166 (8th Cir. 1972).

¹⁰ *In re Naftalin & Co.*, SEC File No. 3-3277 (1971).

ments exonerated the prosecution of all claims of impropriety.

Under *Jackson* an affirmative showing of substantial prejudice is not essential for a finding of a due process violation (1) in a case where the Government has engaged in intentional delay in order to gain a tactical advantage or (2) in other outrageous cases of unjustified delay. The Eighth Circuit in an earlier order in *Jackson* had remanded the case with instructions for the District Court to make findings as to the reasons for the eleven month delay between the offense and the Indictment. In the present case, 55 months passed between the time the brokers became aware of the allegedly fraudulent transactions and the bringing of the Indictment. On the basis of prior proceedings against Naftalin & Co. arising out of the same transactions, defendant suggests that the Government was aware of the facts alleged in the Indictment as much as four and one-half years before the indictment was brought. The Government has not disputed this inference nor offered any justification for the apparent delay in instituting prosecution.

The appropriate procedure for resolving claims of unjustified pre-Indictment delay and of intentional delay for tactical advantage is that followed in *U.S. Gypsum*. Faced with similar defense motions arising out of a five year delay between initial investigation and presentation to the grand jury, the Court in *U.S. Gypsum* ordered production of all relevant Government documents for *in camera* inspection. Subsequently, the Court allowed defense inspection of the documents. This Court will, therefore, order production of certain Government documents for *in camera* inspection and reserve decision until after the inspection on whether the documents will be disclosed to the defense and on whether an evidentiary hearing will be required. The documents to be produced are those requested in paragraph 14, subdivisions (a), (b), and (c), of defendant's Motion for Discovery and Inspection, filed May 17, 1974:

"14. All records in the possession, custody or control of the Government, including specifically the SEC and the Federal Reserve Board, from which the following information can be determined:

(a) The date or dates on which, and the manner in which, any of the matters alleged in the Indictment relating to transactions of Naftalin & Co., Inc., or the activities of the defendant, during the period from July through October 1969, first came to the attention of the SEC, the Federal Reserve Board, the Department of Justice and any United States Attorney.

(b) The nature, extent and duration of the investigative activity undertaken by the SEC and the Federal Reserve Board relating to such matters, together with the dates and nature of any resulting actions taken or recommendations made.

(c) The nature and extent of the information generated by such investigative activities which was thereafter provided or made available to any other agency of the Government, including the Justice Department or any United States Attorney, together with the dates on which the information was provided or made available."

IV. COUNTS I-V: JURISDICTIONAL ACT—

Defendant contends that the jurisdictional requirement of use of the mails or other instrumentalities of commerce is not satisfied by the allegations that the defrauded brokers used the mails to send defendant confirmation of his sales. Defendant maintains that these mailings are so remote from the alleged scheme that they do not support Federal jurisdiction. In support of this contention, defendant cites *Getchell v. United States*, 282 F.2d 681 (5th Cir. 1960). In *Getchell*, the mailing upon which jurisdiction under § 17(a) was alleged concerned the form in which subscribers wished their certificates to be made out. It contained no offers, promises, or representations. The Fifth Circuit reversed three convictions based on this mailing. Defendant interprets these reversals as signifying that a conviction under § 17(a) requires that the mails be employed directly in the scheme to defraud.

Although not without ambiguity, the result in *Getchell* appears to be based on the Government's failure to prove the particular use of the mails set out in the Indictment. 282 F.2d at 684. The Court noted that the "question of statutory construction need not be decided in this case." *Id.* This Court does not find *Getchell* persuasive authority for defendant's contention.

The Government cites *United States v. Cashin*, 281 F.2d 669 (2nd Cir. 1960), as supporting jurisdiction in the present case. In affirming a conviction under § 17(a), *Cashin* observed (281 F.2d at 674):

"No claim is made that the fraudulent matter was mailed or even that the mailings alleged were necessary to the execution of the unlawful scheme. In fact, the only alleged use of the mails was to confirm purchases already induced by the defendant's deceit."

In *Cashin* the defendant was charged with fraud in the sale of securities and jurisdiction was based on his mailing of confirmations of the sales. In the present case, defendant Naftalin did not mail confirmations but received confirmations mailed by the brokers. The Indictment charges that defendant "caused" these confirmations to be mailed. The connection between the scheme and the use of the mails is weaker in the present case than in *Cashin*.

The Court of Appeals for the Eighth Circuit has held that the jurisdictional act requirement of § 17(a) is to be construed broadly. *Little v. United States*, 331 F.2d 287 (8th Cir. 1964), cert. den. 379 U.S. 834, sustained a conviction under § 17(a) in which the jurisdictional act was defendant's deposit of the duped investors' checks in a Memphis bank with knowledge that the checks would move through interstate commerce to the Federal Reserve Bank in St. Louis. In holding that defendant "caused" the checks to move in interstate commerce, the Court relied on a Supreme Court decision concerning mail fraud:

"Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be fore-

seen, even though not actually intended, then he "caused" the mails to be used." *Pereira v. United States*, 347 U.S. 1, 8-9 (1954), quoted in *Little, supra*, at 293.

Little noted that "Congress intended to assert its full constitutional power" in enacting the jurisdictional provisions of the Securities Act of 1933, and that a prosecution under § 17(a) may be sustained if the mail is "used in employing the scheme however incidental the mailing may be. [Citation omitted.]" 331 F.2d 292-293.

As an experienced trader in securities, defendant would have known that a confirmation by mail would follow each of the sales listed in the Indictment. The Indictment adequately alleges that defendant "caused" the confirmations to be mailed. These confirmations are incidental to the scheme charged and, under *Little*, will support jurisdiction under § 17(a).

V. "UNLAWFULLY" AS NECESSARY ELEMENT OF COUNTS II THROUGH VIII—

Defendant contends that since § 17(a) uses the word "unlawful," an Indictment thereunder is fatally defective unless it alleges that the defendant acted "unlawfully." This contention is without merit. The section reads: "It shall be unlawful for any person" "Unlawful" is not an element of the proscribed conduct; it only introduces what is proscribed. The Court holds it is not necessary for the Indictment to allege that defendant acted "unlawfully."

VI. SURPLUSAGE—

Defendant requests that two portions of Count I in the Indictment be stricken as surplusage: (1) the allegation in paragraph 2 that Naftalin & Co. was a registered broker/dealer and a member of the National Association of Securities Dealers; (2) the allegations in paragraph 6 that defendant made false and misleading statements to the selling brokers after the due dates for delivery of the

stock sold. In support of the first request, defendant relies on the Eighth Circuit's treatment of Naftalin & Co. as an ordinary investor in *In re Naftalin*, 469 F.2d 1166 (8th Cir. 1972). As discussed in Part I of this memorandum, this Court does not read the characterization of Naftalin & Co. by the Eighth Circuit as applying outside the context of Regulation T. Therefore, the Government is not foreclosed from proving that Naftalin & Co. was a broker/dealer. Such proof would be relevant to defendant's understanding of securities trading practices and, thereby, to defendant's intent. The allegation is not surplusage.

Defendant contends that subsequent misrepresentations are not material to a violation of § 17(a) because the section is directed only to fraudulent schemes "in the offer and sale of securities." The Government argues that these misrepresentations were part of the on-going scheme to defraud the selling brokers. It cites *Walters v. United States*, 256 F.2d 840 (9th Cir. 1958), cert. den. 358 U.S. 833, in which the Ninth Circuit approved the giving of the following instruction by the District Court in a § 17(a) prosecution:

"A scheme to defraud may well include later efforts to avoid detection of the fraud. Avoidance of detection and prevention of recovery of property fraudulently obtained may be a material part of an illegal scheme." 256 F.2d at 843.

By negative implication, the quoted passage suggests that an effort to avoid detection will not in every situation be deemed a material part of an illegal scheme. It is necessary to view the total scheme charged to determine if the subsequent acts are so related as to be part of the offense.

Count I, paragraph 5, of the present Indictment alleges that defendant sought through his scheme to effect short sales of the stock sold. The inference which follows from paragraph 5 is that defendant would at a later date close out the short sales by buying and delivering the necessary stock certificates. The closing out of the short sales is part of the total scheme. The statements alleged in para-

graph 6 were intended to placate the selling brokers until defendant could complete his scheme by buying and delivering the stock certificates. The Court concludes that these statements are a material part of the total scheme with which defendant is charged. The motion to strike paragraph 6 of Count I must be denied.

/s/ Earl R. Larson
EARL R. LARSON
United States District Judge

January 28, 1975.

SUPREME COURT OF THE UNITED STATES

No. 78-561

UNITED STATES, PETITIONER

v.

NEIL T. NAFTALIN

ORDER ALLOWING CERTIORARI. Filed December 11, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.